SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1970

No. 1500

UNITED STATES OF AMERICA, for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

*Plaintiffs,*

—against—

THE FLUOR CORPORATION, LTD., *et al.*,

*Defendants.*

---

AMERICAN EXPORT INDUSTRIES, INC.,

*Petitioner,*

THE FLUOR CORPORATION, LTD.,

*Respondent.*

## PETITION BY AMERICAN EXPORT INDUSTRIES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# INDEX


PAGE

Opinions Below ..... 3

Jurisdiction ..... 3

Questions Presented for Review ..... 4

Statutes and Rules Involved ..... 5

Statement of the Case ..... 6

- Mosher's Action in the Arizona District Court .... 6
- Union's Counterclaim in the Mosher Suit ..... 8
- Fluor's Failure to File Any Cross-Claim or Counterclaim in the Mosher Suit ..... 8
- The Judgment of the Arizona District Court ..... 9
- The Affirmance of the Mosher Judgment by The Court of Appeals for the Ninth Circuit ..... 9
- The Arizona District Court's Denial of Fluor's Motion Upon Notice to AEI for an Order Decreeing an Assignment of the Arizona Judgment to Fluor Upon Fluor's Payment Thereof ..... 10
- Fluor's Payment of the Mosher Judgment ..... 11
- Fluor's Registration of the Mosher Judgment in the Southern District ..... 12
- AEI's Rule 60(b)(5) Motion in the Southern District ..... 14
- The District Court's Refusal to Decide AEI's Rule 60(b)(5) Motion Upon the Merits ..... 15
- The Decision of the Circuit Court of Appeals for the Second Circuit ..... 15

PAGE

Reasons for Granting the Writ ..... 16

1. Under *Erie R.R. Co.* v. *Tompkins,* 304 U. S. 64 And *Klaxon Co.* v. *Stentor,* 313 U. S. 487, The Substantive Law Of New York, As The State Of Registration, Governs The Registrability And Enforceability In New York Of The Arizona Federal Judgment. Under The Substantive Law Of New York, The Arizona Judgment Has Been Paid, Satisfied And Discharged 16

2. Under 28 U.S.C. § 1963, A Paying Judgment Debtor Has No Power To Register The Judgment So Paid Under An Alleged Assignment From The Judgment Creditor In Derogation Of The Substantive Law Of The State Where The Judgment Is Sought To Be Registered .... 20

3. The Decisions Of The Court Below Cannot Be Justified, As The Court Of Appeals Indicated In Its Opinion, By A Supposed Analogy To The Doctrine Of *Forum Non Conveniens* ..... 21

4. The Decisions Of The Courts Below Cannot Be Justified By The Powers Of Transfer Granted To A District Court Under 28 U.S.C. § 1404 (a) ..... 22

5. The Decisions Of The Courts Below Have Improperly Partitioned A Single Claim For Relief Into Two Separate Parts Between Two Different Courts, A Continent Apart, For Adjudication ..... 24

Conclusion ..... 25

PAGE

APPENDIX A—

Opinion of the United States Court of Appeals for the Second Circuit ..... 1a

Opinion of District Judge Metzner of the United States District Court for the Southern District of New York 6a

TABLE OF AUTHORITIES

*Cases:*

*American Guild* v. *Damon*, 186 N. Y. 360 ..... 19
*Arvidson* v. *Reynolds Metals Co.*, 107 Fed. Supp. 51 .... 17

*Booth* v. *Farmers and Mechanics' Nat. Bank*, 74 N.Y. 228 ..... 19
*Brackett* v. *Winslow*, 17 Mass. 153 ..... 21

*Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 .....4, 16, 18, 19
*Ezell* v. *Equity Gen. Ins. Co.*, 219 Fed. Supp. 51 (1962) 18, 19

*Farrell* v. *Wyatt*, 408 F. 2d 664 (1969) .....23, 24

*Guaranty Trust Co.* v. *York*, 326 U.S. 99 ..... 19
*Gulf Oil Corp.* v. *Gilbert*, 300 U.S. 485 ..... 21

*Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92 (2nd Cir., 1952) ..... 17
*Harbeck* v. *Vanderbilt*, 29 N. Y. 395 ..... 19
*Matter of Harvey* v. *Harvey*, 183 Misc. 475 .....19, 20
*Hoffman* v. *Blaski*, 363 U. S. 335 (1960) .....22, 24
*Hoft* v. *Mohn*, 215 N. C. 397 ..... 21

*Klaxon Co.* v. *Stentor*, 313 U.S. 487 .....4, 16, 18, 19

PAGE

*Lockin* v. *Switzer Bros. Inc.*, 335 F. 2d 594 (7th Cir., 1941) ..... 17
*Lynch* v. *Jones*, 179 App. Div. 613 ..... 19

*Matanuska Valley Lines, Inc.* v. *Molitor*, 365 F. 2d 358 (9th Cir., 1966); cert. den. 386 U.S. 914 .....18, 19
*Mutual Life Ins. Co.* v. *Krejci*, 123 F. 2d 594 (7th Cir., 1941) ..... 17

*In re Plumbing Fixture Cases*, 298 Fed. Supp. 484 ..... 24

*Schroeder* v. *171.74 Acres of land etc.*, 318 F. 2d 411 (8th Cir., 1963) ..... 22
*Stanford* v. *Utley*, 341 F. 2d 265 (1955) ..... 17

*Ten Eyck* v. *Craig*, 62 N. Y. 406 ..... 19
*Towe* v. *Felton*, 52 N.C. (7 Jones L.) 216 ..... 21

*U. S.* v. *Nat. City Lines*, 334 U. S. 573 ..... 23

*Van Dusen* v. *Barrack*, 376 U. S. 612 .....19, 20

*Woods* v. *City of Salamanca*, 289 N. Y. 279 ..... 17

*Statutes:*

28 U.S.C.A. § 1332 (c) ..... 2

28 U.S.C. § 1254 (1) ..... 4

28 U.S.C. § 1963 .....4, 6, 11, 15, 16, 17, 18, 20, 21, 26

28 U.S.C. § 1404 (a) .....3, 5, 6, 22, 25

40 U.S.C. § 270a and 270b ..... 7

PAGE

*Rules:*

Rule 60 (b) (5) .....2, 3, 4, 5, 14, 15, 23, 25

*Texts:*

Moore, Federal Practice, vol. 1, § 0.77, p. 717 et seq. .... 2

Moore, Federal Practice, vol. 7B; JC, 852-853 ..... 20

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## PETITION BY AMERICAN EXPORT INDUSTRIES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMERICAN EXPORT INDUSTRIES, INC. ("AEI"), the petitioner herein, a Delaware corporation, with its principal place of business in the State of New York, and the successor to WARD INDUSTRIES CORPORATION ("Ward"),[1] re-

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[1] Ward was succeeded by Dragor Shipping Corporation ("Dragor") which, in turn, was succeeded by American Export Industries, Inc. ("AEI"). All references in the Joint Appendix or briefs to Ward or Dragor shall be deemed references to AEI.

spectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in the above-captioned cause on the 24th day of December, 1970.

By its order, the Court of Appeals affirmed an order of the United States District Court for the Southern District of New York (Judge Charles M. Metzner) dated June 20, 1970, denying AEI's motion, by order to show cause dated April 3, 1970, for an order under Rule 60 (b) (5) of the Federal Rules of Civil Procedure (14a-17a):[2]

(1) Granting relief from a judgment originally entered by the United States District Court for the District of Arizona on May 24, 1966 in favor of the MOSHER STEEL COMPANY ("Mosher"), and registered approximately four years later in the Southern District of New York after it was paid and satisfied by one of the judgment debtors, THE FLUOR CORPORATION, LTD. ("Fluor"), in order to enforce the whole of that judgment in the Southern District against the property of the petitioner AEI, a New York citizen[3] and likewise a judgment debtor; and

(2) Restraining the enforcement of the aforesaid judgment by Fluor under the writ of execution and levies issued upon the property of AEI physically situated in the Southern District.

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[2] Unless otherwise indicated, all pages references are to the Joint Appendix.

[3] AEI, as well as its predecessors Ward and Dragor, is a Delaware corporation with its principal place of business in the County, City and State of New York (44a; 46a; 101a; 125a; 127a; 131a-132a). Consequently, both AEI and its predecessors were and are New York citizens. (Moore, Federal Practice, vol. 1, § 0.77, pp. 717 et seq.; 28 U.S.C.A. § 1332(c)).

Although AEI's Rule 60 (b) (5) motion sought relief from a judgment of the Southern District, based upon a payment which occurred approximately four years *after* the entry of the Arizona judgment, Judge Metzner ruled that the issues presented thereby "can most readily and quickly be determined by the Arizona Court which is most familiar with the entire litigation" (174a). He thereupon denied the motion, providing AEI "time to move for appropriate relief in the United States District Court for the District of Arizona" (174a).

In affirming, the Court of Appeals held that, although "The powers of a District Court to grant relief against a judgment registered there under 28 U.S.C. § 1963 have not been comprehensively delineated", the issues presented by AEI's motion for relief from the New York judgment should be "referred back" to the Arizona District Court, under a supposed analogy to 28 U.S.C. § 1404 (a) and the doctrine of *forum non conveniens.*

## Opinions Below

The opinion of the Court of Appeals is not yet reported but is printed in Appendix A, infra, pp. 1a to 5a. The opinion of the District Court is set forth at pp. 6a et. seq. of Appendix A and at pp. 172a-174a of the Joint Appendix.

## Jurisdiction

The petitioner filed a timely petition for a rehearing and a rehearing *in banc* which were both denied by the Court of Appeals on February 9, 1971. By a stipulation between the parties, execution upon the New York judgment has been stayed pending the filing, consideration and disposition by

this Court of the within petition for a writ of certiorari by AEI.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

## Questions Presented for Review

1. Under *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64 and *Klaxon Co.* v. *Stentor,* 313 U. S. 487, does the substantive law of New York, the state of registration, govern the registerability and enforceability in that state of an Arizona federal judgment?

2. Does 28 U.S.C. § 1963 authorize the registration of a federal judgment in another federal district by a paying assignee judgment debtor, thereby permitting the enforcement of such judgment for the full amount thereof against a co-judgment debtor without any judicial determination of the equities between them?

3. Where an Arizona Federal judgment is paid by one of several judgment debtors who then obtains an assignment thereof from the judgment creditor, registers the judgment in New York and issues an execution thereon for the entire amount of the judgment against the New York property of a co-judgment debtor, a New York citizen, may the Southern District, as the Court of registration, refuse to hear and determine a motion under Rule 60 (b) (5), FRCP, for relief from the enforcement of the New York judgment upon the ground that it was paid, satisfied and discharged after its rendition and prior to its registration in New York?

4. May a New York Federal Court compel a New York citizen to apply for relief from a New York registered

judgment to the Court of rendition, 3,000 miles away, although the basis for relief occurred after the entry of the judgment and the Court of rendition possesses no jurisdiction over the person of the New York citizen, its New York property, the writ of execution or levies issued in New York or the New York judgment sought to be enforced by the processes of the New York Court?

5. Were the Courts below correct in partitioning the unitary claim for relief in the instant case by ordering the movant, either under 28 U.S.C. 1404 (a) or the doctrine of *forum non conveniens,* to apply for relief therefrom to another Federal Court, a continent apart, while retaining jurisdiction of all proceedings to enforce the judgment?

## Statutes and Rules Involved

Rule 60 (b) (5), FRCP, reads as follows:

> ". . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished,

and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

28 U.S.C. § 1963 reads as follows:

"A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

28 U.S.C. § 1404 (a) reads as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

## Statement of the Case

### Mosher's Action in the Arizona District Court

Mosher's action in the Arizona District Court arose out of the construction by the United States Government of Missile Launch Facilities near the Davis-Monthan Air Base at Tucson, Arizona ("the Tucson Project"). The principal or prime contract for the Tucson Project was issued to Fluor by the Army Corps of Engineers, Ballistic Missile Construction Office (20a).

Fluor, in turn, *subcontracted*[4] a substantial portion of the work required by the prime contract to the Graver

[4] All italics are ours unless otherwise indicated.

Tank and Manufacturing Company ("Graver"), a division of the Union Tank Car Company ("Union"). (In those proceedings, as in all prior and subsequent proceedings, the names "Union" and "Graver" are used interchangeably to designate the Union Tank Car Company.) Under its subcontract, Union was required as *Fluor's first-tier-subcontractor* to purchase, fabricate and erect the steel required for certain levels and structures upon the Tucson Project (20a-21a).

Thereafter, in turn, Union subcontracted a portion of its work, including the steel fabrication, but not the steel erection, to a joint venture consisting of AEI and a company named Idaho-Maryland Industries, Inc. ("IMI"). Subsequently, Union removed the steel fabrication work from the joint venture subcontract and entered into a contract directly with Mosher, a Texas steel fabricator and supplier, for Mosher's fabrication of the steel purchased by Union for the Tucson Project (21a).

As the prime contractor, *Fluor was liable* under the Miller Act, 40 U.S.C. §§ 270a and 270b, *for the payment of all work, labor and services performed and materials furnished for the Tucson Project to Union, its first-tier subcontractor* (21a). Under that Act, Fluor had furnished *as principal* a surety company bond known as a Miller Act bond for the purpose of assuring such payment for all unpaid labor and materials supplied to Union, its first-tier subcontractor (21a). The sureties upon the Miller Act bond were eight insurance companies, all of whom, collectively, were designated "the Sureties" (21a, 41a-42a, 100a-101a).

Subsequently, Mosher fabricated and delivered Union's steel to Union for the Tucson Project, but never received payment therefor from Union. Consequently, it commenced an action in the Arizona District Court under the Miller Act against Fluor, the prime contractor, and principal upon

the Miller Act bond; the Sureties under the Miller Act bond; and Union, Fluor's first-tier subcontractor. In addition, it joined AEI as an alleged "additional obligor", *not under the Miller Act,* but upon an alleged promise independently made to pay the amount of its bill (23a).

**Union's Counterclaim in the Mosher Suit**

Union filed *a counterclaim in the Mosher action against Mosher* wherein it sought a decree that, should Mosher obtain a judgment against Union and AEI, it be directed to levy against the property of AEI before it attempted to levy against the property of any other judgment defendant. The Arizona District Court granted Union leave to file the counterclaim against Mosher upon Union's claim that it was entitled to such relief under Arizona statutes, *as an alleged surety of AEI* (134a-135a; 149a-150a).

**Fluor's Failure to File Any Cross-Claim or Counterclaim in the Mosher Suit**

At no time prior to the entry of the final judgment in the Mosher action by the Arizona District Court, or its affirmance upon appeal did Fluor file or attempt to file, under the Federal Rules of Civil Procedure, a cross-claim against AEI, Union or anyone else upon the ground that "the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against a cross-claimant". It asserted no rights of any kind as a so-called surety under the Arizona statutes upon which Union relied.

**The Judgment of the Arizona District Court**

Upon the conclusion of the trial, the *Arizona District Court held that Union was directly, primarily and individually responsible under its oral and written contracts with Mosher for the payment to Mosher of the value of the*

*services performed and materials furnished to Union upon both the Tucson and Vandenburg Projects.* The Court thereupon entered a judgment on May 24, 1966 against Union for the balance due and owing from Union to Mosher in the sum of $268,882.92 (23a). As the prime contractor upon the Tucson Project, both Fluor and the Sureties upon Fluor's Miller Act bond were held liable for Union's default in the sum of $246,165.95, since neither Fluor nor its Sureties were involved in the small project known as the Vandenburg Project (23a). *Union's counterclaim as an alleged surety of AEI demanding that Mosher be compelled to enforce the judgment first against the property of AEI was dismissed upon the merits* (136a).

A judgment was also entered by the Arizona District Court against AEI upon the ground that, by virtue of a promise allegedly made by AEI *after* Union had contracted with Mosher, it had become an *additional obligor* of Mosher, (123a) notwithstanding its finding that, under the agreement respecting Mosher, Union *would "deduct Mosher's invoices from the contract price between Union and IMI-WARD"* (121a).

**The Affirmance of the Mosher Judgment by The Court of Appeals for the Ninth Circuit**

Subsequent to the entry of the judgment, all of the defendants appealed to the Court of Appeals for the Ninth Circuit, Union appealing additionally from the District Court's dismissal upon the merits of its counterclaim as an alleged surety of AEI.

On January 6, 1969, the Court of Appeals for the Ninth Circuit sustained the finding of the Trial Court that Union had incurred a direct and primary obligation to Mosher; that Mosher was a party which had directly contracted with Union as a first-tier subcontractor of Fluor under the Miller

Act; and *that Fluor and the Sureties were therefore liable to Mosher for the full amount of its claim because of Union's failure to pay Mosher.* It affirmed the dismissal of Union's counterclaim because it found *"that Union's relationship to the debt to be that of a direct obligor, not a surety."* (405 F. 2d 823).[5]

The Court of Appeals also affirmed the District Court's judgment against AEI as an additional obligor to Mosher, although it found that: "On November 15, after securing IMI-Ward's approval, *Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract"* (59a).

**The Arizona District Court's Denial of Fluor's Motion Upon Notice to AEI for an Order Decreeing an Assignment of the Arizona Judgment to Fluor Upon Fluor's Payment Thereof**

Subsequent to the affirmance of the Mosher judgment and the denial by this Court of a petition for a writ of certiorari on May 5, 1969 (23 L. Ed. 2d 40), Fluor and Union continued their efforts to foist the Mosher judgment upon AEI. In or about June 13, 1969, Fluor moved before the Arizona District Court upon notice to AEI for an order and decree providing that (27a-28a; 125a-132a):

> "Upon *payment* of said judgment in whole or in part, *that the said judgment be considered to have been assigned by operation of law to The Fluor Corporation* and that The Fluor Corporation be adjudged entitled to enforce said judgment against either Union Tank Car Company or American Export Industries, Inc. according to law, including the right to register said

[5] The opinion of the Court of Appeals is set forth in full at pp. 56a to 69a of the Joint Appendix.

judgment and enforce the same in any other Federal district pursuant to 28 U.S.C.A. § 1963."

In support of its motion, Fluor claimed that it was "in the position of surety" for AEI (128a) although it admitted, under the signature and oath of its attorneys, Bilby, Thompson, Shoenhair & Warnock, who represented both Fluor and Union in the Mosher case, and represent Fluor in these proceedings, that (28a; 127a):

"Fluor was held liable to Mosher solely on the basis of the Miller Act . . ."

The motion, not opposed by Union, was opposed by AEI upon the grounds that: (1) The liability of Fluor under the Miller Act and the Miller Act bond was a liability imposed upon it solely and only because of the default of Union, its first-tier subcontractor, and not because of any act committed by AEI; (2) Fluor was not a surety of AEI and could not possibly assert any claim against AEI for any act of AEI which did not subject Fluor to any obligation to Mosher; and (3) one of several judgment debtors who has paid a judgment cannot, as a matter of law, attempt to keep the judgment alive for any purpose whatsoever by procuring an alleged assignment thereof from the judgment creditor (28a-29a; 136a-137a).

*The motion was denied upon the merits by the Arizona District Court on July 22, 1969 without opinion.* No appeal from that decision was ever taken by Fluor and it is now final, irrevocable and dispositive (137a, 29a).

**Fluor's Payment of the Mosher Judgment**

Thereafter, Fluor proceeded, on September 8, 1969, *without any notice to AEI, or the knowledge of AEI,* to execute an agreement with Mosher under which Fluor paid Mosher

the sum of $297,788.90 upon the Mosher judgment and obtained an assignment thereof from Mosher. By the terms of that agreement, *Mosher released Fluor and the Sureties*, as well as the Surety upon the supersedeas bond which had been filed by Fluor upon its appeal to the Court of Appeals (29a-31a; 137a; 79a-82a). The agreement provided (80a):

> "2. In consideration of such payment, MOSHER STEEL COMPANY assigns to THE FLUOR CORPORATION, LTD., . . . *all of its right, title and interest in and to the judgment rendered in its favor on May 24, 1966 against all of the defendants in this action* and agrees that THE FLUOR CORPORATION, LTD. shall be entitled, to the extent of such payment, to plaintiff's rights in said judgment including, without limitation, the right to register said judgment pursuant to 28 U.S.C.A. 1963 in any other federal jurisdiction."

**Fluor's Registration of the Mosher Judgment in the Southern District**

On March 13, 1970, without the knowledge of AEI or any prior notice to AEI, Fluor registered the Mosher judgment in the Office of the Clerk of the Southern District (83a-84a). An execution was issued thereon against AEI (83a-84a) and levies made upon the monies and property of AEI at the Chemical Bank and the First National City Bank, both located in the City of New York (85a-88a).

From the commencement of the Mosher action, Fluor had been fully aware of the fact that Union's breach of its direct promise to pay Mosher would subject Fluor to a judgment in favor of Mosher under the Miller Act and the Miller Act bond. It likewise knew that it could only recoup the amount of its payment of that judgment from *Union, and not from AEI.* Thus, throughout the course of

the Mosher trial, as well as upon the appeal to the Ninth Circuit and the petition for a writ of certiorari to this Court, Fluor admitted, as it stated in support of its petition for a writ, that "the *sole basis* for the judgment" against Fluor and the Sureties was the District Court's Conclusions of Law number (3) that *"Mosher had a direct contractual relationship with Union . . ."* (137a-138a).

Fluor's liability to Mosher as the prime contractor under the Miller Act and the Miller Act bond created an immediate and absolute right to Fluor to complete indemnification from Union, a multimillion dollar corporation, whose default constituted the only basis for the liability imposed upon Fluor. Fluor's enforcement of its right to indemnification against Union required no lawsuit whatsoever; it could have been satisfied by Fluor a dozen times from the more than $5,000,000.00 of Union monies which had been received by Fluor from the United States Government for the benefit of Union (138a-139a).

Both before and after the commencement of the Mosher lawsuit, and as the prime contractor, Fluor had been processing the claims of Union against the United States Government for additional compensation upon the Tucson Project.

By June of 1969, when the Mosher case had been finally concluded upon appeal, Fluor had received from the United States Government and paid to Union the approximate sum of $5,000,000.00, *more than fifteen times the sum required to discharge its liability under the Mosher judgment*, more than $3,000,000.00 of which had been received *after* the entry of that judgment on May 24, 1966.

Fluor never attempted to explain in the Courts below why it had delivered to Union the more than $5,000,000.00 which it had received from the United States Government

without deducting therefrom the amount of its liability under the Mosher judgment or without providing for the retention of sufficient monies with which to discharge that liability without the necessity of suing Union therefor. Nor is there any explanation whatsoever of why Fluor, which could have so readily reimbursed itself for the amount of its payment to Mosher from the Union monies, should have failed to do so but proceeded, instead, to obtain an alleged assignment of the Mosher judgment and attempt to execute thereon against AEI.

**AEI's Rule 60(b)(5) Motion in the Southern District**

AEI's first knowledge of Fluor's payment of the Mosher judgment, its alleged assignment by Mosher to Fluor and Fluor's registration thereof in the Southern District occurred on or about April 1, 1970, when AEI was advised by its New York banks that more than $306,000 of its New York deposits had been seized by Fluor under the New York registered judgment. Two days later, by an order to show cause dated April 3, 1970, AEI moved, under Rule 60(b)(5), FRCP, for relief from the New York registered judgment upon the ground, in the language of that Rule, that "the judgment has been satisfied, released or discharged".

In opposing AEI's Rule 60(b)(5) motion, Fluor advanced two legal arguments: (1) That its payment of the Mosher judgment as a judgment debtor did not extinguish that judgment because, according to its own *ex parte* fiat, it was a self-proclaimed "surety" for AEI in spite of the prior judicial decisions to the contrary; and (2) that the Federal Courts "discourage collateral attacks upon judgments registered under 28 U. S. C. 1963 and generally hold that Rule 60(b) motions should be addressed to the Trial Court".

**The District Court's Refusal to Decide AEI's Rule 60(b)(5) Motion Upon the Merits**

In refusing to decide AEI's Rule 60(b)(5) motion for relief from its own judgment, the District Court ruled that: "The resolution of the issues can most readily and quickly be determined by the Arizona Court which is most familiar with the entire litigation" (174a). It ignored the fact that AEI was seeking relief from the New York judgment, *not* the Arizona judgment, and that the basis for that relief, to wit, the payment of the judgment by Fluor had occurred more than three and a half years after the entry of the original judgment by the Arizona Court. Although it retained jurisdiction over the New York execution procedures invoked by Fluor, it stayed the enforcement of the judgment "for a period of fifteen days to afford AEI time to move for appropriate relief in the United States District Court for the District of Arizona" (174a).

By its decision, the District Court relegated a New York citizen to an application for relief from a New York judgment being enforced against it in New York to a Court 3,000 miles away, even though that Court possesses no jurisdiction whatsoever over the person of AEI, its property in the State of New York, the writ of execution and levies issued by the United States Marshal in New York, or the New York judgment sought to be enforced herein.

**The Decision of the Circuit Court of Appeals for the Second Circuit**

On December 24, 1970, the order of the District Court was affirmed by the Court of Appeals for the Second Circuit. Conceding that "The powers of a District Court to grant relief against a judgment registered there under 28 U.S.C. § 1963 have not been comprehensively delineated",

the Court, in an opinion by Judge Kaufman, thereupon held:

> ". . . the analogy to the federal courts' traditional *forum non conveniens* procedures is persuasive. See *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). Here, AEI's motion for relief under Rule 60(b)(5) raised virtually the same issues in the Southern District of New York as the District Court of Arizona had already considered in Fluor's post-judgment motion. Comity among the district courts would obviously be furthered if these issues were referred back to the court which originally considered them. Moreover, because the Arizona court was already familiar with the issues, the interests of efficient judicial administration commend that court as an eminently suitable forum for further related proceedings.
>
> Affirmed."

## Reasons for Granting the Writ

**1. Under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 And *Klaxon Co.* v. *Stentor*, 313 U. S. 487, The Substantive Law Of New York, As The State Of Registration, Governs The Registrability And Enforceability In New York Of The Arizona Federal Judgment. Under The Substantive Law Of New York, The Arizona Judgment Has Been Paid, Satisfied And Discharged.**

We respectfully submit that the decisions of the Courts below have deprived AEI of its constitutional right to be heard by the very Court whose judgment, entered *ex parte* by a judgment debtor whose right to collect the same in full from another judgment debtor has never been judicially sustained, and takes its property without due process of law. The Courts below have ignored a fundamental con-

cept of our jurisprudence, "the fact that a citizen of a State is entitled to relief in the courts thereof and not in some alien tribunal which may be thousands of miles away at the behest of a foreign corporation" (*Arvidson* v. *Reynolds Metals Co.*, 107 Fed. Supp. 51, 52; *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92 [2nd Cir., 1952]).

The determination of a Rule 60 (b) (5) motion is no exception to the principle that a "court may not refuse arbitrarily to exercise jurisdiction when it is invoked by appropriate proceeding" (*Mutual Life Ins. Co.* v. *Krejci*, 123 F. 2d 594, 596 [7th Cir., 1941]; *Lockin* v. *Switzer Bros. Inc.*, 335 F. 2d 331 [7th Cir., 1964]).

The judgment of the Southern District under which AEI's New York property was seized, entered by registration under 28 U.S.C. § 1963, is a determination of the rights of the parties. (*Woods* v. *City of Salamanca*, 289 N.Y. 279, 283). Relief from a judgment by the very court which entered the judgment, where mandated by the facts and law, is a legal right and not a matter of grace to be granted or withheld at the court's caprice. A denial of that right to the party aggrieved cannot be justified by the letter, spirit, purpose or intent of 28 U.S.C. § 1963.

In *Stanford* v. *Utley*, 341 F. 2d 265 (1955), the Eighth Circuit, in an opinion by Judge Blackmun, reversed the District Court which had held that the registration statute does not give the judgment creditor a new judgment, but "merely confers ministerial powers on the court in the district in which a judgment is registered" (p. 268). Judge Blackmun declared:

> "We have concluded that § 1963 is more than 'ministerial' and is more than a mere procedural device for the collection of the foreign judgment. We feel that registration provides, so far as enforcement is

> concerned, the equivalent of a new judgment of the registration court. In other words, for the present fact situation and for enforcement purposes, the Missouri federal registration equated with a new Missouri federal judgment on the original Mississippi federal judgment, that is, *it is no different than a judgment timely obtained by action in the Missouri federal court on that Mississippi judgment.*"

Under *Erie* and *Klaxon Co.*, the substantive law of the registration State governs the enforceability and validity of a judgment registered under 28 U.S.C. § 1963. Thus, in *Matanuska Valley Lines, Inc.* v. *Molitor*, 365 F. 2d 358, cert. den. 386 U. S. 914, the Ninth Circuit held at 360:

> "The Supreme Court in Klaxon Co. v. Stentor Co. was guided by a desire to preserve equal administration of justice in 'coordinate state and federal courts sitting side by side.' We think that this principle is equally applicable in registration proceedings under 28 U.S.C. §1963 . . . ."

In *Ezell* v. *Equity Gen. Ins. Co.*, 219 Fed. Supp. 51, 52 (1962), the District Court of Oregon ruled that, under *Erie*, "the substantive law" of Oregon governed a foreign federal judgment registered in that Court:

> ". . . Plaintiff overlooks the fact that she is not *attempting to here enforce a judgment of the District Court of Arkansas* and *that this Court is duty bound to recognize the substantive law of the State of Oregon in dealing with its judgment in these proceedings.* § 1963, supra."

As appears from the foregoing decisions, the judgment enforced in these proceedings is *not* the judgment of the Arizona District Court but the judgment of the New York

District Court. Under *Erie* and *Klaxon*, that Court "is duty bound to recognize the substantive law of the State of [New York] in dealing with its judgment in these proceedings." (*Ezell* v. *Equity Gen. Ins. Co.*, 219 Fed. Supp. 51 [1962]; *Matanuska Valley Lines, Inc.* v. *Molitor*, 365 F. 2d 358 [9th Cir., 1966], cert. den. 386 U. S. 914).

Under New York law, had such an action been brought in New York upon the Arizona judgment by Fluor as the paying assignee-judgment debtor, AEI would have possessed an absolute defense thereto. Under New York law, Fluor's payment of the Arizona judgment automatically satisfied and discharged the same. (*Harbeck* v. *Vanderbilt*, 20 N. Y. 395, 397; *Ten Eyck* v. *Craig*, 62 N. Y. 406; *Booth* v. *Farmers and Mechanics' Nat. Bank*, 74 N. Y. 228; *American Guild* v. *Damon*, 186 N. Y. 360; *Lynch* v. *Jones*, 179 App. Div. 613; *Matter of Harvey* v. *Harvey*, 183 Misc. 475).

In *Matter of Harvey*, 183 Misc. 475, it was held that, under New York law, the recovery by a paying judgment debtor against another cannot be obtained "by a short cut of an assignment of the judgment when the law provides that the assignment satisfies the judgment. . . This decision does not foreclose Cleveland M. Harvey from any action which he may have against Laura Harvey. It merely forecloses him from collecting a judgment before he has proven in court the facts necessary to recover."

"The nub of the policy that underlies *Erie R. Co.* v. *Tompkins*", said this Court in *Van Dusen* v. *Barrack*, 376 U. S. 612, 638, repeating its language in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109, a policy which has been contravened by the decisions of the courts below in the instant case, "is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

**2. Under 28 U.S.C. § 1963, A Paying Judgment Debtor Has No Power To Register The Judgment So Paid Under An Alleged Assignment From The Judgment Creditor In Derogation Of The Substantive Law Of The State Where The Judgment Is Sought To Be Registered.**

The most exhaustive research has failed to disclose any authority which authorizes the registration, under 28 U.S.C. § 1963, of a judgment by a paying judgment debtor under an alleged assignment from the judgment creditor in derogation of the substantive law of the State where the judgment is sought to be registered. Further research under comparable English and Australian statutes further confirms the absence of any such authority. The reasons are obvious. § 1963 was intended to obviate the necessity for the institution of a second action *by the judgment creditor* against the judgment debtors in a second federal court since all the issues between the judgment creditor and the judgment debtors had already been fully and finally determined. (Moore, Federal Practise, vol. 7B; JC, 852-853).

However, *the issues between the judgment debtors themselves* are not ordinarily determined in the same action. Consequently, in New York, the paying judgment debtor may *not,* by assignment and execution, enforce that judgment against another judgment debtor "before he has proven in court the facts necessary to recover." (*Matter of Harvey* v. *Harvey,* 183 Misc. 475).

To hold that § 1963 does not confer the right of registration upon an assignee-judgment debtor is to recognize the universal rule of law that "the judgment is faced toward the enforcement of the creditor's right . . ."; that such right "is to have his judgment paid by any or all of those jointly and severally liable, *without regard to the equities between*

*them"*; that "such right, ready to hand in the form of an enforceable remedy, ought not in equity to be acquired by one or more of the judgment debtors for enforcement against the others"; and that *"the judgment itself is not a suitable instrument for the adjustment of equities between the judgment debtors . . ."* (*Hoft* v. *Mohn*, 215 N.C. 397, 398). To bestow upon a paying assignee-judgment debtor the power of registration "would be to give him an undue advantage, and *enable him to exact the whole debt*, or to prevent such equitable set-offs as his companion might have against him." (*Brackett* v. *Winslow*, 17 Mass. 153, 159). The power of registration in the hands of an assignee-judgment debtor would completely contravene the doctrine that: "The creditor may regard all as principals . . . and collect the whole out of any one, *but it would be iniquitous to confer upon the associate debtor the same power . . .*" (*Towe* v. *Felton*, 52 N.C. [7 Jones L.] 216).

**3. The Decisions Of The Court Below Cannot Be Justified, As The Court Of Appeals Indicated In Its Opinion, By A Supposed Analogy To The Doctrine Of *Forum Non Conveniens*.**

The decisions of the Courts below that a District Court may, by its own fiat, refuse to hear an application for relief *from its own judgment* and relegate a party whose property has been seized thereunder *to a foreign tribunal for relief*—a tribunal without subject matter or *in personam* jurisdiction—cannot be justified by any supposed analogy to the doctrine of *forum non conveniens*. "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least *two forums*" in which the defendant is amenable to process and the action or proceeding could have been brought (*Gulf Oil Corp.* v. *Gilbert*, 300 U. S. 485, 506-507).

No proceeding could possibly be brought in the Arizona District Court to enforce the New York judgment against the New York property of AEI. Consequently, there is only one forum, *not two,* in which the New York judgment can be enforced; only one forum, *not two,* which can issue a writ of execution and levy upon the property of AEI physically situate in New York; only one forum, *not two,* which possesses the power to institute, prosecute or abate the enforcement procedures invoked by Fluor in this proceeding. Consequently, there is only one forum, not two, to which AEI can apply for relief from the New York judgment being enforced against it upon the ground that it has been paid, satisfied and discharged. No other court but the Southern District, no matter where it may be located, possesses the power to enjoin the enforcement of its judgment by the U. S. Marshal for that District or restrain AEI's New York banks from making any payment of its assets thereunder.

**4. The Decisions Of The Courts Below Cannot Be Justified By The Powers Of Transfer Granted To A District Court Under 28 U.S.C. § 1404 (a).**

Nor can the decisions of the Courts below be deemed to constitute, "in practical effect", a transfer to the Arizona District Court under 28 U.S.C. § 1404 (a). The Arizona District Court is not the Court in which the New York judgment was entered. It is not a Court which may exercise jurisdiction over the New York property of AEI (*Schroeder* v. *171.74 Acres of land etc.,* 318 F. 2d 411 [8th Cir. 1963]). It is not, in short, a Court in which the New York enforcement procedures initiated by Fluor "might have been brought" (*Hoffman* v. *Blaski,* 363 U. S. 335 [1960]).

It is no answer to say that AEI may be coerced into an application for relief to the Arizona District Court by a

denial of its application to the Southern District and that its submission to the *in personam* jurisdiction of the Arizona court, even if coerced, would then create a second forum in which the enforcement proceedings "might have been brought". A defendant's assent, whether forced or voluntary, to the jurisdiction of another tribunal, *after* the action or proceedings have been commenced, cannot create a second forum in which the action or proceedings "might have been brought." Of a like contention, this Court held in *Hoffman* v. *Blaski,* supra, at pp. 342-344:

> "We do not agree. We do not think that the § 1404 (a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require 'where it may now be rebrought, with defendants' consent.'"

It is necessary to note that Fluor's enforcement procedures in the Southern District remain intact; that only AEI's opposition thereto has been relegated to the Arizona District Court; and that the Arizona District Court will now be called upon to decide AEI's Rule 60 (b) (5) motion to vacate the New York judgment and restrain its enforcement by the Marshal for the Southern District. It does not possess the constitutional power to do so. The transfer to the Arizona District Court solely and only of AEI's opposition to the New York enforcement proceeding will inevitably create, not avert, "a merry-go-round of litigation upon the issue . . ." (*U. S.* v. *Nat. City Lines,* 334 U. S. 573, 591-592). As Judge Feinberg emphasized in *Farrell* v. *Wyatt,* 408 F. 2d 662, 664 (1969): " . . . if the district court had no power to transfer, 'the transfer will be a nullity,' the transferee court 'will have no jurisdiction * * *, and any judgment it may enter will be void.' . . ."

Potentially, the decisions below may effect precisely the unseemly judicial limbo with which this Court was con-

fronted in *Hoffman* v. *Blaski*, 363 U. S. 335. In that case, an action was transferred by the Texas Federal Court to the Northern District of Illinois, the order of transfer having been affirmed by the Fifth Circuit. The Illinois District Court, affirmed by the Seventh Circuit, ruled that the transfer was erroneous because it possessed no jurisdiction over the person of the defendants. As a result this Court was called upon to intervene in the shuttling back and forth of the case at hand between the transferee and transferor Courts. It did so by affirming the refusal of the transferee Court to accept the transfer upon the ground that it was not a forum in which the action "might have been brought".

**5. The Decisions Of The Courts Below Have Improperly Partitioned A Single Claim For Relief Into Two Separate Parts Between Two Different Courts A Continent Apart For Adjudication.**

By their decisions, the Courts below have relegated AEI to an application for relief to the Arizona District Court from the New York judgment, while retaining jurisdiction of all pending proceedings in New York to enforce the judgment. They have thereby effected a fragmentation of a single claim for relief into separate parts dispersed between two different Courts for adjudication, a fragmentation which disregards the fundamental principles of federal jurisprudence formulated with such clarity in *In Re Plumbing Fixture Cases*, 298 Fed. Supp. 484, 495, a recent decision by the Judicial Panel on Multi-district Litigation. In that case, the seven judge Federal Court held (p. 495):

> "Partition of the pretrial processes in a single claim for relief, with contemporaneous exercise of jurisdiction by two or more district courts over the separated

parts, is not only unprecedented in federal jurisprudence but violates well settled principles of judicial management. *Two courts of exclusive different jurisdictions, or venues, cannot exercise control over the same single claim for relief at the same time.* . . . A single claim for relief, however, is separable by issues for trial under Rule 42 only if the entire action and all issues therein remain under control of one court (as distinguished from a judge of the one court). The reason is that, in federal civil procedure, the claim for relief is the irreducible legal unit for purposes of venue and jurisdiction by a single court at a particular time. This unitary concept of the claim for relief permits transfer of the claim for relief from one district court to another as in case of a transfer under Sections 1404(a), or 1407. But in no such separation and transfer is *contemporaneous dual control by two or more district courts of a single claim for relief (or separate issues thereof) permissible in the federal system.*"

## CONCLUSION

The decisions below in the instant case constitute so drastic a departure from existing law; so sharp a conflict with the decisions of this Court and other Circuits in their view of Rule 60 (b) (5), FRCP, and 28 U.S.C. §§ 1404 (a) and 1963; and are so completely at variance, under *Erie* and *Klaxon,* with the substantive law of New York governing the validity and enforceability of New York judgments that they should be reviewed by this Court for the purpose of harmonizing and unifying essential areas of Federal jurisprudence for the benefit of all Federal Courts, before the decisions below become

erroneously imbedded in the decisional law of District and Circuit Courts throughout the land.

For all of the foregoing reasons, it is respectfully submitted that the within petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

JOSEPH LOTTERMAN
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New York, N. Y. 10017
*Attorney for Petitioner,*
AMERICAN EXPORT INDUSTRIES, INC.

# APPENDIX

# APPENDIX A

## Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 364—September Term, 1970

(Argued December 15, 1970 Decided December 24, 1970)

Docket No. 35091

---

UNITED STATES OF AMERICA, for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY,

*Plaintiffs,*

—v.—

THE FLUOR CORPORATION, LTD.,

*Defendant-Appellee,*

AMERICAN EXPORT INDUSTRIES, INC.,

*Defendant-Appellant,*

*et al.*

---

Before:

MOORE, KAUFMAN, and HAYS,

*Circuit Judges.*

---

Appeal from an order of the United States District Court for the Southern District of New York, Metzner, *J.*,

denying a motion for relief against a judgment, F. R. Civ. P. 60(b)(5).

Affirmed.

---

JOSEPH LOTTERMAN, New York, N. Y., *for Defendant-Appellant.*

HAROLD C. WARNOCK, Tucson, Ariz. (Bilby, Thompson, Shoenhair & Warnock, Tucson, Ariz., Harold L. Falls, Jr., Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., of Counsel), *for Defendant-Appellee.*

---

KAUFMAN, *Circuit Judge*:

This complicated controversy, involving three tiers of contractors and subcontractors on a federal missile site construction project in Arizona, and centering around a judgment entered in the United States District Court for the District of Arizona, was brought eastward when the appellee Fluor Corporation, Ltd. ("Fluor"), registered that judgment in the Southern District of New York pursuant to 28 U.S.C. §1963.

The appellant American Export Industries, Inc. ("AEI") against whom execution was issued, moved for relief from the judgment upon the ground that it had already been satisfied, released and discharged. Fed. R. Civ. Proc. 60(b)(5). AEI asks us to rule that Judge Metzner abused his discretion in holding that the Arizona district court was a more suitable forum to resolve the question, and accordingly denied AEI's motion without prejudice to its presentation in the Arizona Court. Finding that the court below acted well within its discretion, we affirm.

*Appendix A*

A brief reference to the background may be helpful in viewing this conflict in perspective. Because of difficulties in the construction of a missile site near Tucson, Arizona in 1961-1962, Mosher Steel Co. ("Mosher"), a second-tier subcontractor, was awarded a judgment in excess of $200,000 against AEI (another second-tier subcontractor), the Union Tank Car Co. ("Union") (a first-tier subcontractor), Fluor (the general contractor); and the sureties on Fluor's Miller Act payment bond. 40 U.S.C. §§270a, 270b. On appeal to the Ninth Circuit Court of Appeals, the judgment was affirmed in all respects having any relevancy to this appeal. *Fluor Corp.* v. *United States ex rel. Mosher Steel Co.*, 405 F.2d 823 (9th Cir.), cert. denied, 394 U.S. 1010 (1969).

Soon after the United States Supreme Court denied certiorari, Fluor moved before the Arizona district court for an order decreeing that, in the event that Mosher satisfied its judgment against Fluor, Fluor would have a right to recover from both Union and AEI. AEI opposed this motion on a number of grounds. It contended among other things that the Mosher judgment would be extinguished for all purposes by Fluor's payment, that Fluor was bound by the terms of a settlement between AEI and Union, and that Arizona law denied Fluor a right of subrogation against AEI. The Arizona district court denied Fluor's motion without opinion.

Soon thereafter, Fluor apparently paid the Mosher judgment, and received in return an assignment of Mosher's rights thereunder against AEI and the Union. Fluor then proceeded to register that judgment in the Southern District of New York. When execution was levied, AEI brought its Rule 60(b)(5) motion for relief, urging the same arguments it had presented—apparently successfully

—to the Arizona district court in opposition to Fluor's post-judgment motion.

At the threshold we address ourselves to a question the parties have not considered: whether the district court's order is appealable. The question is apparently a novel one. Although in practical effect the denial of AEI's motion was similar to a nonappealable transfer of the case to another district, 28 U.S.C. §1404(a), we believe that the more compelling analogy is to the ancient remedy of dismissal upon the grounds of *forum non conveniens*, which is appealable, see *Ford Motor Co.* v. *Ryan*, 182 F.2d 329 (2d Cir.), cert. denied, 340 U.S. 851 (1950); 9 J. Moore, Federal Practice ¶110.13[6].

The powers of a district court to grant relief against a judgment registered there under 28 U.S.C. §1963 have not been comprehensively delineated. That it may grant relief in certain circumstances seems clear. *Hadden* v. *Rumsey Prods.*, 196 F.2d 92 (2d Cir. 1952); 7 J. Moore, Federal Practice ¶60.28[1]. Few would argue, however, that the court of registration lacks discretion in appropriate circumstances to refer the parties to the court which rendered judgment. Again, the analogy to the federal courts' traditional *forum non conveniens* procedures is persuasive. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).[1] Here, AEI's motion for relief under Rule 60(b)(5) raised virtually the same issues in the Southern District of New York as the District Court of Arizona had already considered in Fluor's post-judgment motion. Comity among the district courts would obviously be furthered if these issues were referred

[1] The transfer of an action to a more convenient district pursuant to 28 USC §1404(a) has largely supplanted dismissal upon grounds of *forum non conveniens*. See *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955).

back to the court which originally considered them. Moreover, because the Arizona court was already familiar with the issues, the interests of efficient judicial administration commend that court as an eminently suitable forum for further related proceedings.

Affirmed.

*Appendix A*

**Opinion of District Judge Metzner of the United States District Court for the Southern District of New York**

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

M 18-302—36887

---

UNITED STATES OF AMERICA, for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY,

*Plaintiffs,*

—against—

THE FLUOR CORPORATION, LTD., et al.,

*Defendants.*

---

METZNER, *D. J.*:

This is a motion pursuant to F.R.C.P. 60(b)(5) to relieve American Export Industries, Inc. (AEI) from a final judgment on the ground that it has been satisfied, released and discharged.

The judgment was originally entered in the United States District Court for the District of Arizona after what appears to have been a long and complicated litigation which involved appeals to the Court of Appeals of the 9th Circuit and the denial of a writ of certiorari by the Supreme Court. The action was brought under the Miller Act by Mosher Steel Company, as use plaintiff, against the Fluor Corporation, the prime contractor, the sureties on Fluor's Miller Act bond, Union Tank Car Company, a subcontractor of Fluor, and Ward Industries

Corporation (predecessor of AEI), a subcontractor of Union. The judgment was registered in this court pursuant to 28 U.S.C. § 1963. Execution was issued on the judgment and levies were made on bank accounts of AEI in New York totaling $306,003.30.

Preliminarily, the court is faced with the question as to whether this motion must not be made in the court where the judgment was originally entered. In two cases where the question has been raised, it was not necessary for the determination of the motion for the courts to resolve the problem. *Hadden* v. *Rumsey Prods.*, 196 F.2d 92, 95 (2d Cir. 1952); *James Blackstone Memorial Assn.* v. *Gulf, Mobile & O. R.R.*, 28 F.R.D. 385, 386 (D. Conn. 1961). In *Vaughn* v. *Petroleum Conversion Corp.*, 120 F. Supp. 175, 178 (D. Conn. 1953), *aff'd*, 211 F.2d 499 (2d Cir.), *cert. denied*, 348 U.S. 873 (1954), the court indicated that there was substantial doubt whether the relief requested could be granted by a court in which the judgment was registered. Moore states that in his opinion "the court of registration should have the power, as a practical matter, to grant relief by motion under Rule 60(b) for a number of reasons: . . . ." 7 Moore, Federal Practice ¶ 60.28[1], at 315 (2d ed. 1968). I agree that under certain circumstances such a motion may be entertained by the court in which the judgment is registered, but I do not find such circumstances to exist in this matter.

AEI contends that the District Court in Arizona denied Fluor's motion to be subrogated to the rights of the plaintiff under the judgment. Fluor had requested that upon payment of the judgment it be considered to have been assigned by operation of law from Mosher to Fluor, and that Fluor could enforce the judgment against either

*Appendix A*

Union or AEI, including the right to register and enforce it in any other district. The question of satisfaction of the judgment arises out of prior litigation between Union and AEI in Arizona and Connecticut.

Fluor contends that the denial of the motion was not dispositive of its right to subrogation, indemnity or contribution against AEI. The papers on that motion are not before the court. Fluor claims that it entered into a stipulation with Mosher assigning the judgment to Fluor, which stipulation was approved by the court.

The relationships between Fluor and AEI are crucial to the determination of this motion. The resolution of the issues can most readily and quickly be determined by the Arizona court which is most familiar with the entire litigation. This is especially true since Fluor has raised questions of applicable Arizona law. This court cannot determine the issues on the basis of the papers presented to it.

The motion is accordingly denied. Any execution and levy issued for the enforcement of the judgment is stayed for a period of fifteen days to afford AEI time to move for appropriate relief in the United States District Court for the District of Arizona. So ordered.

Dated: New York, N. Y.
June 19, 1970

CHARLES M. METZNER
*U. S. D. J.*

...ARY
SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
APR 14 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970
No. 1500

AMERICAN EXPORT INDUSTRIES, INC.,
*Petitioner,*

*vs.*

THE FLUOR CORPORATION, LTD.,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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# INDEX


PAGE

Opinions Below ..... 1

Jurisdiction ..... 1

Statutes and Rules Involved ..... 2

Question Presented ..... 2

Statement ..... 3

Nature of Litigation ..... 3

Arizona Litigation ..... 5

Appellate Proceedings ..... 6

Post Appeal Proceedings ..... 7

Pro Tanto Assignment of Judgment ..... 8

Registration of Judgment ..... 9

New York District Court Opinion ..... 9

Opinion of Court of Appeals ..... 10

ARGUMENT ..... 11

POINT I

The Petition Presents Neither A Federal Question Of Substance Nor A Conflict Between Circuits .. 11

POINT II

Petitioner's State Law Contentions Are Inappropriate For Consideration By This Court ..... 17

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

PAGE

CASES:

*James Blackstone Memorial Assn.* v. *Gulf, Mobile & Ohio R. R.*, 28 F. R. D. 385, 388 (D. Conn. 1961) ..... 15

*Butcher & Sherrerd* v. *Welsh*, 206 F. 2d 259 (3rd Cir. 1953) ..... 8

*Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 766 (5th Cir. 1954) ..... 15

*Eno* v. *Crooke*, 10 N. Y. 60, 66-7 (1854) ..... 18

*Gagnon* v. *United States*, 193 U. S. 451 (1904) ... 7

*Hadden* v. *Rumsey Prods.*, 196 F. 2d 92, 95 (2d Cir. 1952) ..... 10

*Herpe* v. *Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919) ..... 8

*Lapin* v. *Shulton, Inc.*, 333 F. 2d 169 (9th Cir. 1964) ..... 13

*Mosher* v. *Conway*, 45 Ariz. 463, 46 P. 2d 110 (1935) ..... 18

*Providential Development Company* v. *United States Steel Company*, 236 F. 2d 277, 281 (10th Cir. 1956) ..... 15

*Smith* v. *National Surety Co.*, 28 Misc. 628, 59 N. Y. S. 789, *aff'd*, 46 App. Div. 633, 62 N. Y. S. 1105 (1899) ..... 18

*Stanford* v. *Utley*, 341 F. 2d 265 (1965) ..... 16

*Torquay Corporation* v. *Radio Corporation of America*, (S. D. N. Y. 1932) 2 F. Supp. 841 ... 14

*Townsend* v. *Whitney*, 75 N. Y. 425, 429-30 (1878) 18

*Wetmore* v. *Carrick*, 205 U. S. 141 (1907) ..... 8

*Winfield Associates, Inc.* v. *Stonecipher*, 429 F. 2d 1087 (10th Cir. 1970) ..... 14

PAGE

STATUTES:

28 U. S. C. § 1963 .....2, 12, 18

40 U. S. C. § 270 (a) ..... 5

40 U. S. C. § 270 (b) (65a) ..... 6

§ 12-1643 (a) Arizona Revised Statutes ..... 18

RULES:

60 (b) Federal Rules of Civil Procedure .....13, 14, 15 16, 17, 18

60 (b) (5) Federal Rules of Civil Procedure ...2, 9, 11

TEXTS:

7 Moore's Federal Practice, ¶ 60.19, p. 223 ..... 12

7 Moore's Federal Practice ¶ 60.28 28[2] p. 316 .. 13

IN THE

# Supreme Court of the United States

October Term, 1970

No. 1500

AMERICAN EXPORT INDUSTRIES, INC.,
*Petitioner,*

*vs.*

THE FLUOR CORPORATION, LTD.,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

### Opinions Below

The opinion of the District Court for the Southern District of New York (App. A of Petition, pp. 6a-8a) is not officially reported. The opinion of the Court of Appeals for the Second Circuit (App. A of Petition, pp. 1a-5a) is not yet reported.

### Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

## Statutes and Rules Involved

The pertinent statutes and rules involved are Rule 60 (b) (5) of the Federal Rules of Civil Procedure and 28 U. S. C. § 1963 which are set forth in the Petition at pp. 5 and 6.

## Question Presented

By its judgment the Court below affirmed an order of the District Court for the Southern District of New York denying a motion of petitioner, American Export Industries, Inc. (AEI), filed pursuant to Rule 60 (b) (5) of the Federal Rules of Civil Procedure which sought (1) to vacate a judgment rendered by the District Court for the District of Arizona and registered in the Southern District of New York pursuant to 28 U. S. C. § 1963; and (2) to restrain respondent, The Fluor Corporation, Ltd. (Fluor) as assignee from enforcing the judgment through writ of execution and levy upon petitioner's property.

The motion was denied without prejudice to AEI's right to seek a comparable remedy in the Arizona District Court on the ground that "resolution of the motion can most readily and quickly be decided by the Arizona Court which is most familiar with the entire litigation" (App. A to Petition, p. 8a). Enforcement of the registered judgment was stayed for 15 days in order to afford petitioner adequate time to move for appropriate relief in Arizona. AEI nevertheless refused to apply to the Arizona District Court, electing instead to appeal to the Court below. In our view the judgment of the Court of Appeals in affirming the order of the District Court presents only one question:

> Whether, in view of the long and complicated history of proceedings before the Arizona District Court, the Court below erred in concluding that the

New York District Court "acted well within its discretion" in denying AEI's Rule 60 (b) (5) motion to vacate the registered judgment without prejudice to petitioner's right to apply for identical or other relief before the Arizona District Court "which is most familiar with the litigation."

## Statement

The complicated history of this litigation is delineated in the findings of fact and conclusions of law entered by the Arizona District Court (100a-123a) and in the opinion of the United States Court of Appeals for the Ninth Circuit (56a-69a) reported at 405 F. 2d 823. We endeavor to summarize that history below.

### Nature of Litigation

This litigation arose out of construction performed for the United States Government on the Titan II missile launch facilities erected at Davis Monthan Air Force Base, Tucson, Arizona. In 1961 Fluor entered into a prime contract with the United States Government Army Corps of Engineers for the completion of Phase II work on the Davis Monthan project. Fluor then entered into a first-tier subcontract with the Graver Division of Union Tank Car Company (Union) which subcontract covered the steel fabrication and erection included in Fluor's prime contract with the government. Union's Graver Division in turn entered into a second-tier subcontract with IMI-Ward, a joint venture composed of Idaho-Maryland Industries, Inc. (IMI) and Ward Industries Corporation (the latter being the corporate predecessor of AEI) which subcontract covered a substantial portion of the steel fabrication included in Graver's first-tier subcontract with Fluor (57a-58a).

When IMI-Ward fell behind the work schedule on the project, Graver insisted that IMI-Ward subcontract a portion of its steel fabrication work to other materialmen and in this connection approved IMI-Ward's selection of Mosher Steel Company (Mosher) as a qualified fabricator. On November 3, 1961 IMI-Ward entered into a contract with Mosher by issuing purchase orders pursuant to which Mosher fabricated and delivered the steel covered in the orders (110a-120a). Fluor paid Graver for this work pursuant to its first-tier subcontract. Graver in turn paid IMI-Ward pursuant to its second-tier subcontract by making payment to the California National Bank to which IMI-Ward had assigned its invoices in a security financing transaction (117a).

The project was of an emergency nature. Mosher proceeded on a rush basis to fabricate and to deliver the steel but failed to submit invoices for payment in proper form to IMI-Ward until January 19, 1962 (117a). IMI-Ward in the interim was proceeding with its subcontract and was billing and received payment on the basis of percentage of work completed which work included Mosher's fabricated steel. By the end of January, 1962 Mosher had fabricated and delivered most of the steel called for by the IMI-Ward purchase orders but had received no payment from the joint venture when on February 2, 1962 IMI filed a petition under Chapter XI of the Bankruptcy Act (118a).

Ward thereupon abandoned the second-tier subcontract and its joint venturer IMI although the IMI-Ward joint venture agreement provided ". . . that the obligation of the joint venture under this subcontract with Union . . . shall be joint and several . . ." (104a). Moreover, Union's Graver Division refused to pay Mosher, because it had no contract with Mosher and in any event had already overpaid IMI-Ward (93a). As a result Mosher, although it fully performed the purchase orders, went unpaid, while

IMI-Ward, although it defaulted in its express contractual obligation to pay Mosher, received payment for the steel which Mosher had fabricated and furnished for the project.

**Arizona Litigation**

In January, 1963 Mosher brought suit in the Arizona District Court against Fluor and its Miller Act bonding companies, and against Ward and Union in order to recover the contract price provided in the IMI-Ward purchase orders.

After protracted discovery and trial proceedings, the Arizona District Court on May 24, 1966 entered findings of fact and conclusions of law and directed the entry of a joint and several judgment against Ward and Union in the amount of $268,822.92 (123a) based on its conclusion that both Ward and Union were directly obligated to pay Mosher.

The Arizona District Court on the same date further directed the entry of a separate joint and several judgment in the amount of $246,165.96 against Fluor and the bonding company co-defendants, based solely upon Fluor's obligation under a payment bond posted pursuant to the Miller Act, 40 U. S. C. § 270(a), for the protection of persons supplying labor and material in the prosecution of the work. This judgment did not include $22,716.96 that Mosher recovered from Ward and Union for steel delivered to another project in which Fluor was not involved. Such Miller Act liability was imposed despite the fact that Fluor had no express or implied contract with Mosher whatsoever and had already paid for the work. Its liability resulted exclusively from IMI-Ward's failure to pay Mosher for the steel required to complete its second-tier subcontract with Union and from Union's breach of a promise to pay Mosher direct if IMI-Ward failed to do so. The Arizona trial court found that the latter promise was a "direct con-

tractual relationship" under the Miller Act (120a). In the absence of this finding, Fluor would, of course, not have been liable.

**Appellate Proceedings**

Appeals were subsequently taken to the United States Court of Appeals for the Ninth Circuit. In connection with these appeals Fluor, alone among the defendants, posted a supersedeas bond to stay enforcement of the judgment. On January 6, 1969 the Court of Appeals for the Ninth Circuit affirmed the judgments against all defendants and remanded the cause to the District Court on Mosher's cross-appeal for the calculation and award of pre-judgment interest. In summarizing its decision with respect to Union and IMI-Ward, the Court of Appeals declared (61a):

> "... *the court determined that both Union and IMI-Ward assumed direct liability to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work* described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher." (Emphasis supplied)

The Court of Appeals further concurred in the District Court's conclusion that Union's promise to pay, if IMI-Ward did not, put Mosher in the position of a person "having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b) (65a).

**Post Appeal Proceedings**

Following denial of defendants' certiorari petitions on May 5, 1969 (394 U. S. 1014), Fluor found itself in the vulnerable position of being the only defendant against which Mosher could readily levy. Fluor had posted a supersedeas bond while Ward and Union had no assets within the Arizona District. Fluor therefore filed a motion in the Arizona District Court for an order granting leave to file a cross-claim against AEI and Union and for indemnity (125a-126a).

This motion was opposed exclusively on jurisdictional grounds. AEI took the position that the Arizona District Court had lost jurisdiction to entertain a cross-claim and to seek indemnity in the action after the final judgment had been affirmed by the Court of Appeals and certiorari had been denied by this Court. It also asserted that AEI was no longer subject to suit in Arizona and that a cross-claim could not be entertained on the theory of ancillary jurisdiction (95a).

In opposing the motion AEI declared that it was:

> ". . . appearing, specially upon this motion by The Fluor Corporation, Ltd. ('Fluor') *solely and only* for the purpose of recording its objection (1) to the jursidiction of this Court over the subject matter of Fluor's motion and alleged cross-claim and (2) to the jurisdiction of this Court over the person of Ward." (Emphasis supplied)

AEI also cited authorities to the effect that after a final judgment was affirmed on appeal, the District Court was powerless to entertain further proceedings and its jurisdiction was limited to compliance with the mandate of the Court of Appeals. *Gagnon* v. *United States,* 193 U. S.

451 (1904); *Wetmore* v. *Carrick,* 205 U. S. 141 (1907); *Herpe* v. *Herpe,* 225 N. Y. 323, 122 N. E. 204 (1919); *Butcher & Sherrerd* v. *Welsh,* 206 F. 2d 259 (3rd Cir. 1953).

The District Court subsequently denied Fluor's motion without opinion or comment.

**Pro Tanto Assignment of Judgment**

With the case in this posture, Fluor on September 8, 1969 paid Mosher $297,788.90, representing the amount of the $246,165.96 separate judgment against Fluor and the bonding companies, plus costs and statutory interest. In return Fluor received a pro tanto assignment of the larger judgment against Ward and Union (to which Fluor was not a party) and a discharge of Fluor's supersedeas and Miller Act bonds. Because of its Miller Act bond, Fluor was forced to make this payment despite the fact that it had already paid once for the work Mosher performed. The assignment (79a-81a) was embodied in a stipulation filed of record and approved by order of the Arizona District Court on September 12, 1969 (124a). The assignment provided (80a):

> "In consideration of such payment, Mosher Steel Company assigns to The Fluor Corporation Ltd., pro tanto to the extent of $297,788.90, all of its right, title and interest in and to the judgment rendered in its favor on May 24, 1966 against all of the defendants in this action and agrees that The Fluor Corporation, Ltd., shall be entitled to the extent of such payment, to plaintiff's rights in said judgment including, without limitation, the right to register said judgment pursuant to 28 U. S. C. A. § 1963 in any other federal jurisdiction . . ."

**Registration of Judgment**

Fluor obtained a certification of judgment and of the assignment of judgment from the Clerk of the Arizona District Court which it subsequently registered with the Clerk of the United States District Court for the Southern District of New York on March 13, 1970 (12a-13a) pursuant to the provisions of 28 U. S. C. § 1963. Writ of execution was duly issued on the registered judgment and levies made on March 31, 1970 upon AEI's funds held at the First National City Bank and the Chemical Bank and Trust Company of New York (83a-85a-88a).

Following execution and levy, AEI on April 3, 1970 obtained a rule to show cause why an order should not be entered vacating the registered judgment pursuant to FRCP Rule 60 (b) (5) on the ground that the judgment had been paid and discharged as to AEI. It further obtained an order restraining the United States Marshal from proceeding with the levy upon AEI's funds pending disposition of the rule to show cause (14a-17a).

The matter thereafter was heard by the New York District Court on attorneys' affidavits with various exhibits attached constituting only portions of the record of proceedings in the Arizona District Court. Numerous fact disputes appeared in the affidavits concerning the actual course of events in the Arizona Court.

**New York District Court Opinion**

Following briefing and oral argument, and based on the foregoing record, the New York District Court for the Southern District of New York rendered its opinion on June 19, 1970 denying AEI's motion for relief under FRCP Rule 60 (b) (5). The Court observed that as a preliminary matter it was faced with the question whether such a motion to vacate the judgment must not be made before the court

where judgment was originally entered, citing among other authorities the Second Circuit's decision in *Hadden v. Rumsey Prods.*, 196 F. 2d 92, 95 (2d Cir. 1952) where the question was raised but not resolved. The District Court nevertheless was of the opinion "that under certain circumstances such a motion may be entertained by the court in which a judgment is registered, but I do not find such circumstances to exist in this matter" (App. A to Petition, p. 7a).

The District Court then reviewed the conflicting contensions of the parties and noted that only parts of the long and complicated Arizona record were before it. The Court concluded (App. A to Petition, p. 8a):

> "The relationships between Fluor and AEI are crucial to the determination of this motion. The resolution of the issues can most readily and quickly be determined by the Arizona court which is most familiar with the entire litigation. This is especially true since Fluor has raised questions of applicable Arizona law. This court cannot determine the issues on the basis of the papers presented to it."

While denying the motion on the foregoing grounds the Court nevertheless ordered that "[a]ny execution and levy issued for the enforcement of the judgment is stayed for a period of fifteen days to afford AEI time to move for appropriate relief in the United States District Court for the District of Arizona" (App. A to Petition, p. 8a).

**Opinion of Court of Appeals**

On December 24, 1970, the order of the New York District Court was affirmed by the Court below. It concluded that the District Court had "acted well within its

discretion" in denying AEI's motion without prejudice to petitioner's right to proceed in the Arizona District. The Court of Appeals declared (App. A to Petition, p. 4a):

> "Few would argue . . . that the court of registration lacks discretion in appropriate circumstances to refer the parties to the court which rendered judgment . . . Here, AEI's motion for relief under Rule 60(b)(5) raised virtually the same issues in the Southern District Court of New York as the District Court of Arizona had already considered in Fluor's post-judgment motion. Comity among the district courts would obviously be further if these issues were referred back to the court which originally considered them. Moreover, because the Arizona court was already familiar with the issues, the interests of efficient judicial administration commend that court as an eminently suitable forum for further related proceedings."

## ARGUMENT

### I

### THE PETITION PRESENTS NEITHER A FEDERAL QUESTION OF SUBSTANCE NOR A CONFLICT BETWEEN CIRCUITS

The simple and sole issue presented by this case is whether the Court below erred in concluding that the New York District Court acted within its discretion in denying a Rule 60 (b) (5) motion to vacate the registered judgment, without prejudice to petitioner's right to renew its motion before the Arizona District Court which had rendered the judgment and which was "most familiar with the litigation". This ruling clearly presents no federal question of

substance. Nor does it give rise to a conflict with the decisions of any other Circuit. On the contrary, the ruling follows the uncontradicted authority on the issue and represents a laudatory effort to promote judicial economy, thereby serving the purpose of 28 U. S. C. § 1963.

The District Court was presented with a Rule 60(b)(5) motion which would have required it to thoroughly familiarize itself with a highly complex fact situation involving four tiers of subcontractors which had been the subject of seven years of litigation twice reaching the Ninth Circuit Court of Appeals. The Court reasoned that the Arizona District which tried the case and was fully familiar with all its intricacies could "most readly and quickly" decide the issues, particularly since substantial questions of Arizona law were presented. In so deciding, the Court was quite properly exercising the discretion granted it under Rule 60(b). The Rule itself specifically states that a district court "may" on motion relieve a party from a final judgment. The authorities are unanimous that a district court's action pursuant to Rule 60(b) "involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: this matter, then, is largely within the judicial discretion of the trial court." *7 Moore's Fed. Prac.* ¶ 60.19, p. 223 and cases cited therein.

The discretionary nature of a court's role under Rule 60(b) is not altered merely because the judgment from which movant seeks relief is a registered judgment under 28. U. S. C. § 1963. Indeed, the fact that the judgment attacked is a registered judgment adds a further dimension to a court's discretion, for a court has the discretionary power to decline to entertain such a motion:

> "In some instances the court of registration will be a sufficiently convenient forum that it should entertain a motion under 60(b). In others, it should,

> in the exercise of a sound discretion, decline to entertain the motion on the theory that the forum where the judgment was originally rendered is a more convenient and satisfactory forum." *7 Moore's Fed. Prac.* ¶ 60.28 28[2] p. 316.

Thus, in denying the motion because it felt the rendering court was a more convenient and satisfactory forum, the District Court was, as the Court below held, acting "well within its discretion," discretion established by an uncontradicted line of authority.

In *Lapin* v. *Shulton, Inc.*, 333 F. 2d 169 (9th Cir. 1964) the Court considered the meaning of Rule 60 (b) in an action filed in the District Court for the Southern District of California seeking to dissolve an injunction issued by the District Court for the District of Minnesota. The California District Court denied the application on discretionary considerations not unlike those present here. In affirming, the Ninth Circuit held that Rule 60 (b) did not deprive all other courts of jurisdiction but that considerations of comity may make it appropriate for the court of registration to decline to entertain the motion. It declared (p. 172):

> "We need not go so far as to hold that these considerations and interpretation of Rule 60(b) deprive all courts other than the issuing court of jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.
>
> "In this respect we approve the decision and language of the District Court for the Southern

District of New York in *Torquay Corporation* v. *Radio Corporation of America* (S. D. N. Y. 1932) 2 F. Supp. 841.

* * *

"The District Court declined relief, stating, 2 F. Supp. at page 844.

'Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court . . . [C]omplainant's rights, if any, would seem to be more properly justiciable in the court that made the decree, out of which complainant's grievance arises, than here.' "

The Tenth Circuit in *Winfield Associates, Inc.* v. *Stonecipher,* 429 F. 2d 1087 (10th Cir. 1970) recently reached a similar conclusion in an action seeking relief from a registered judgment. There a default judgment has been entered in the District Court for the Northern District of Illinois and registered in the District Court for the District of Kansas. Following registration defendant filed a Rule 60 (b) motion in the Kansas District Court seeking relief from the judgment despite the fact that he had bypassed legal remedies available to him in the District Court which rendered the judgment. The Kansas District Court denied relief both under Rule 60 (b) and in treating the motion as an independent equitable action. On appeal the Tenth Circuit held that the determination of the District Court would not be disturbed in the absence of a clear abuse of discretion. It declared (p. 1090):

> ". . . Although appellant now contends on appeal that Rule 60(b) imposes on the trial court the power to grant relief from the judgments entered in other United States District Courts, he ignores the point that relief under Rule 60(b) is addressed to the sound discretion of the court. Appellant has made no attempt to show an abuse of discretion. On the contrary, it appears that central to the trial judge's exercise of discretion is the fact that appellant deliberately bypassed his legal remedies of appeal from the default judgment and from the rendering court's order denying relief from the judgment."

Compare *James Blackstone Memorial Assn.* v. *Gulf, Mobile & Ohio R. R.*, 28 F. R. D. 385, 388 (D. Conn. 1961) where the court of registration also denied defendant's Rule 60(b) motion but "without prejudice to any rights of petitioner to seek clarification in the court where the original judgment was rendered." See also *Providential Development Company* v. *United States Steel Company*, 236 F. 2d 277, 281 (10th Cir. 1956); *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 766 (5th Cir. 1954).

In our view the foregoing decisions are persuasive authority supporting the conclusion of the Courts below that the relief demanded by AEI might more appropriately be sought in the Arizona District Court. Comparable discretionary considerations, when viewed in light of the long and involved history of this litigation, emphasize the sound reasoning exercised by the Courts below in reaching their decisions.

Petitioner is unable to cite a single authority contrary to those which support the court of registration's right to deny a Rule 60 (b) motion when that court is of the opinion that the rendering court is a more convenient forum to hear the motion. Instead, petitioner relies on an assortment of

unrelated and totally irrelevant decisions in a vain attempt to construct a theory that the court of registration must, as a matter of law, entertain on the merits every Rule 60 (b) motion. Even a cursory examination of the so-called authorities cited reveals no such rule of law. It certainly does not follow, as petitioner argues, that because a registered judgment becomes, *for purposes of enforcement,* a judgment of the court of registration, that therefore the court of registration is powerless to deny a Rule 60(b) motion and suggest that judicial economy will be better served if the rendering court decides the motion. Even in *Stanford* v. *Utley,* 341 F. 2d 265 (8th Cir. 1965), the cornerstone of petitioner's argument, the Court stated (p. 271):

> "The presence of these and undoubtedly many other questions prompts us to emphasize that the conclusion we reach here is one having application to the fact situation of this case. *We do not now go so far as to say that registration effects a new judgment in the registration court for every conceivable purpose*; . . ." (Emphasis supplied)

Petitioner's further arguments concerning *forum non convenience* and § 1404(a) miss the point. The Court below did not rest its decision on either of these; rather it held that the court of registration has discretion to deny a Rule 60(b) motion on the ground that the motion is more conveniently and properly presented to the rendering court and, specifically, that the District Court here acted well within the limits of that discretion. The Court's analogy to *forum non convenience* was merely illustrative of the general principal that courts have the discretion to refer to more convenient forums.

Petitioner's arguments thus reduce to the proposition that AEI should not be put to the trouble of travelling to

Arizona in order to apply for relief. Petitioner neglects to mention, however, that Fluor has been forced to come to New York only because AEI fled the jurisdiction of Arizona where it had for years been qualified to transact business and had defaulted on a multi-million dollar contract, leaving no assets against which the ultimate judgment rendered in favor of Mosher could be enforced. In any case, this Court should not be required to expend its energy on issues involving a mere balancing of conveniences between parties.

In summary, the District Court and the Court below acted within the limits of a well-established and uncontradicted line of authority in ruling that a court of registration may deny a Rule 60(b) motion without prejudice to movant's rights to renew the motion in the rendering court. The rulings prevent discord among the various district courts, promote judicial economy, and at the same time grant a Rule 60(b) movant his right to be heard. Given these facts, it is clear that this petition does not raise any question requiring clarification by, or the attention of this Court. Moreover, it most certainly presents no conflict in decisions of Courts of Appeal.

## II

**Petitioner's State Law Contentions Are Inappropriate For Consideration By This Court**

Petitioner argues at length that under New York law payment by one of several joint judgment debtors "automatically" satisfies the judgment (Pet. pp. 16-19). This is so in some cases, but not under the circumstances present here.

Next, petitioner asserts without the support of any authority, that a paying judgment debtor has "no power" to

register a judgment under 28 U. S. C. § 1963 (Pet. pp. 20-21).

Neither point was the basis of the decision of the trial court, which deemed that the complicated question of the relationship between the parties and the significance of its own judgment were better left to the Arizona court, which was most familiar with the entire litigation. No discussion is required to establish that this Court does not sit nor grant writs of certiorari to resolve disputed questions of state law not even reached in the decision of the Courts below.

Respondent argued below that petitioner's claim that payment by one judgment debtor discharges co-judgment debtors, ignores the principle that a judgment is not extinguished when the payment judgment debtor is not primarily, but only secondarily liable. Under both Arizona and New York law a surety-assignee without question is entitled to seek to recover against a co-judgment debtor who is primarily liable on the judgment. *Townsend* v. *Whitney*, 75 N. Y. 425, 429-30 (1878); *Eno* v. *Crooke*, 10 N. Y. 60, 66-7 (1854); *Smith* v. *Nat. Surety Co.*, 28 Misc. 628, 59 N. Y. S. 789, *aff'd*, 46 App. Div. 633, 62 N. Y. S. 1105 (1899); see *Mosher* v. *Conway*, 45 Ariz. 463, 46 P. 2d 110 (1935); *Ariz. Rev. Stat.*, § 12-1643 (A).

In any event, whether petitioner or respondent is correct as to its understanding of applicable local law in the context of this case, is irrelevant for purposes of determining whether AEI's petition for a writ of certiorari should be granted. What is relevant is that the Court below decided no question of local law in affirming dismissal of AEI's Rule 60 (b) motion without prejudice to its renewal in the Arizona District Court. It is our understanding that this Court has never granted certiorari merely to unravel unresolved questions of state law best left for consideration by a District Court in the first instance. It should not do so now.

## Conclusion

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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